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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 155

FRANK COSTELLO,

Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit affirming an order of the District Court overruling his plea of self-incrimination and fining him for his refusal to answer questions in an oral examination before trial.

Opinions Below

The opinions of the District Court are set forth at pages 31 and 37 of the record herein. Judge McGohey's decision is reported in 16 F.R.D. 428. The opinion of the Court of Appeals is not yet reported and is set forth at page 11 of the Appendix herein.

Jurisdiction

The judgment of the Court of Appeals was entered on May 10, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented

1. Whether petitioner may assert the privilege of self-incrimination with respect to his acquaintances, occupation, income, premises leased by him, aliases and arrests in 1925 and prior thereto, where he is the subject of a net worth income tax criminal prosecution and is charged in denaturalization proceedings with participation in "illicit liquor business and other illegal activities" and a continuing prospective intent at the time of naturalization (without limitation as to crimes or dates after 1925) to violate Federal and State Income Tax laws and other State and Federal laws.

2. Whether the achievement of a [illegible] conspiracy in 1925 conclusively terminates such conspiracy, places it within the bar of the statute of limitations, thereby precludes the bona fide need for the assertion of the privilege of self-incrimination respecting the facts underlying such conspiracy.

3. Whether the decision below, rendered prior to *Emspak* v. *United States* (No. 9, October Term, 1954) is inconsistent therewith.

4. Whether a District Court may overrule a plea of self-incrimination without a hearing.

Constitutional Provisions Involved

There is here involved the Fifth Amendment to the United States Constitution as it relates to the protection against self-incrimination.

Statement

Denaturalization proceedings were instituted against petitioner on October 29, 1952 (R. 1).

The complaint herein charges petitioner with the illegal and fraudulent procurement of naturalization in 1925 in that at the time of naturalization defendant's oath of allegiance was false and was taken (R. p. 3; par. 4 of complaint):

> "with mental reservation to violate and continue to violate the Eighteenth Article of Amendment of the United States Constitution, the National Prohibition Act * * * Federal and State Income Tax laws and other State and Federal laws."

It is further charged that petitioner procured his naturalization fraudulently by misrepresentations that his two witnesses, Fr[illegible]s and Harry C. Sausser, knew petitioner to be of good moral character.

> "* * * as the two said witnesses knew that the defendant was engaged in immoral, illegal and Constitutional violating activities, namely, gambling, illicit liquor business, and other illegal activities." (Par. 5 of Complaint).

Respondent served petitioner's attorneys with a notice, dated July 27, 1954, seeking to take petitioner's deposition before trial (R. 19). Petitioner appeared, and then refused to answer questions upon the claim that he might incriminate himself (R. 21).

The examination sought of petitioner included questions as to the (1) Identity of witnesses to his naturalization (2) Persons acquainted with him (3) His arrests (4) His occupation prior to naturalization (5) His income prior to

naturalization (6) Premises or leases held prior to naturalization and (7) Use of aliases (R. 22, 26-27).

Respondent moved to compel petitioner to answer (R. 28). Petitioner requested a hearing to demonstrate the *bona fides* of his plea of self-incrimination (R. 30). The District Court directed petitioner to answer the propounded questions without a hearing on the issue involved, stating:

> "Defendant's attorney says his client's answer will furnish a link in a chain of evidence that may lead to federal prosecution for perjury, conspiracy, income tax evasion, and other crimes. It is defendant's task to justify his refusal to answer and asserting this litany of crimes is not enough. It does not appear that he ever has been charged with any conspiracy illegally to procure his naturalization. If he participated in one it terminated with his admission to citizenship. *Krulewitch* v. *U. S.*, 336 U. S. 440. Prosecution for any criminal feature of the prosecution of his petition for naturalization has long been outlawed under the Limitations Statute, 18 U. S. C. A. 1382. So has prosecution for perjury, income tax evasions or any other crime he may have committed in 1925, or earlier if he committed any."

Thereafter, petitioner continued in his refusal to answer questions upon the ground of self-incrimination (R. 25). Respondent then moved (R. 32), to strike petitioner's answer and render judgment by default.

The District Court refused to strike petitioner's answer but instead fined him $500.00 (R. 37-42). Both parties appealed (R. 43). The Circuit Court affirmed both appeals (Appendix, p. 11, *infra*). The Circuit Court ruled that:

> "True, the statute does not run against a conspiracy until the conspiracy ends. But any criminal conspiracy for fraud in obtaining his naturalization

necessarily had terminated on the achievement of that objective and hence had long since been barred. And in the absence of some basis for a contrary inference, the possibility of Costello's participation in any other criminal conspiracy which had continued for such a long span of time that it was not yet barred but was still subject to prosecution, was too remote to support a bona fide need for the assertion of the privilege."

Reasons for Granting the Writ

The respondent seeks to compel petitioner to describe his associates, acquaintances, business activities, leases, income, arrests, and aliases in 1925. This will be utilized as the complaint herein shows, to establish that petitioner fraudulently conspired to secure naturalization, was engaged in criminal activities in 1925 and intended *thereafter* to violate income tax and other unnamed federal laws; (R. 2, 3, par. 3, 4, 6). The record herein does not show the "setting of possible incrimination" in view of the District Court's refusal to conduct a hearing to show this background although requested to so do (R. 30). The Court of Appeals, however, took judicial notice (Appendix, herein, pp. 16, 18), of an announcement of Attorney General McGranery in October, 1925 that petitioner, Frank Costello would be required to pay his debt to society,[1] of the Kefauver Report (Senate Report 307, 82d Congress, 1st Session, pp. 111-124) that Costello is one of the king-pins in a major crime syndicate in the United States,[2] and of the recent

[1] The Washington Post reported on October 3, 1952, that:

"In listing the underworld targets, McGranery indirectly took note of fears expressed by Senator John J. Williams (R. Del.) that Frank Costello might be deported before he could be used to testify against other racketeers."

"McGranery gave assurance that none of those involved would be deported until each has 'paid his debt to society.'"

[2] On May 23, 1955 in a speech in Detroit, Attorney General Brownell described Costello as probably "one of the most influential figures in organized crime in the whole country."

income tax prosecutions against him (Appendix herein p. 18).

1. In the setting noted above, proof of past criminal activities, past associates engaged in crime and past illegal income, could necessarily forge the link in the chain establishing present criminality. Refusal to answer questions as to past membership in the Communist Party have been sustained by the Court upon this theory. *Blau* v. *United States,* 340 U. S. 332 (1951) upheld the refusal to answer questions as to whether the defendant had *ever* been a member of the Communist Party. *United States* v. *Zwillman,* 108 F. 2d 802, 803 (C. A. 2, 1940) quoted with approval in footnote 24 of the majority opinion in *Emspak* v. *United States,* (No. 9, Oct. Term, 1954) upheld the privilege in response to questions as to business associates between 1928 and 1932. *Carroll* v. *Savoretti,* 220 F. 2d 910 (C. A. 5, 1955) upheld the refusal to answer whether the defendant was a member of the Communist Party prior to naturalization in 1928. In *Aiuppa v. United States,* 201 F. 2d 287 (C. A. 6, 1952) and *Poretto* v. *United States,* 196 F. 2d 392 (C. A. 5, 1952) refusal to answer questions, as here, as to whether the defendants knew named individuals was upheld.

Obviously, answers to questions as to income, leases, and business activities in 1925 have important tax implications in establishing a net worth starting point if further income tax prosecutions are undertaken against Costello. It should be observed that the Attorney General stated in Detroit, on May 23, 1955, that it was necessary to trace Costello's financial affairs from 1937 on to prove tax evasion in 1947-1949.

If past membership in the Communist Party (prior to 1940) at a time when it was not a crime [*Brunner* v. *United States,* 343 U.S. 918 reversing 190 F. 2d 167 (C.A. 9)] may

have the safeguard of the Fifth Amendment, then past criminal activities alleged here have, at least, an equal protection.

The decision below (rendered prior to *Emspak* v. *United States, supra*) is therefore not only in conflict with other circuits but is contrary to this Court's rulings in *Emspak* v. *United States, supra; Blau* v. *United States, supra;* and *Brunner* v. *United States, supra.* This conflict and the recurrence of this important constitutional problem warrant the grant of certiorari herein.

2. The narrow grounds of the decisions by the District Court and the Court of Appeals were twofold. *First,* it was asserted that any conspiracy to violate our naturalization laws necessarily ended in 1925 with the successful attainment of petitioner's naturalization. This is directly contrary to the views of other circuits. *Skelly* v. *United States,* 76 F. 2d 483, 488-489 (C. A. 9, 1935) *cert. denied,* 295 U.S. 757; *Lew Moy* v. *United States,* 237 Fed. 50, 52 (C. A. 8, 1916). The decisions below overlooked the charge frequently made [but not alleged in the indictment in *Krulewitch* v. *United States,* 336 U.S. 440 (1948)] that a criminal conspiracy may include a purpose to avoid detection and to frustrate prosecution after its successful conclusion. This is recognized in many state court decisions. *State* v. *Dilley,* 44 Wash. 207 (1906) and *Commonwealth* v. *Smith,* 151 Mass. 491 (1890).[3]

Secondly, the Court below conclusively presumed, without any basis therefor, that any other criminal conspiracy beginning in 1925 was barred by the statute of limitations. (Appendix herein p. 18.) If the Government may go back thirty years seeking to revoke Costello's citizenship, what

[3] See also cases collected in Government's Brief, *Krulewitch* v. *United States,* No. 143, Oct. Term, 1948, 336 U.S. 440. That a criminal conspiracy may include a purpose to avoid detection is said by the Government to be the general and long establish rule in state courts.

would prevent it from going back so far to establish a continuing criminal conspiracy on his part?

The decision below is directly contrary to view of the Second Circuit expressed in *United States* v. *Zwillman*, 108 F. 2d 802, 803 (C.A. 2, 1940) where it was said:

> "Evidence necessary to show that defendant was engaged in a conspiracy during the years from 1928 to 1932 might well be supplied by proof of the names of business associates engaged in violating the laws relating to the manufacture or sale of liquor. If a conspiracy was shown in those earlier years, it would continue unless abandoned, and the defendant would have to prove abandonment in order to take advantage of the statute of limitations. *Hyde* v. *United States*, 225 U. S. 347, 308-310 * * * *United States* v. *Rollnick*, 2 Cir. 91 F. 2d 911, 918; *Coates* v. *United States*, 9 Cir., 59 F. 2d 173, 174. The defendant claims, and we think with fair reason, that the answers sought would be a link in the chain of incriminating testimony and that he ought not to be compelled to give them—at least if he could show that he was likely to be endangered by answering."

Other circuits have likewise held that a conspiracy once established is presumed to continue until the contrary is established. *Marino* v. *United States*, 91 F. 2d 691, 695 (C.A. 9, 1937) *Coates* v. *United States*, 59 F. 2d 173, 174 (C.A. 9, 1932).[4] In conflict with this view is that taken below that Costello's participation in any conspiracy to evade income tax laws, liquor laws, and other federal laws in 1925 has necessarily been terminated. Do the Government and the court below concede therefore that Costello has long since ceased conspiring to violate federal laws?

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[4] The act of a conspirator is chargeable to his co-conspirator no matter when committed. *Pinkerton* v. *United States*, 328 U.S. 640, 646 (1945).

Recent announcements of the Attorney General point to the contrary. Moreover, the decision below is contrary to *Emspak* v. *United States, supra,* which states:

> "If an answer to a question may tend to be incriminatory, a witness is not deprived of the protection of the privilege merely because the witness if subsequently prosecuted could perhaps refute any inference of guilt arising from the answer."

To successfully defend a charge of criminal conspiracy existing in 1925 and thereafter to violate income tax, liquor laws and other federal laws, petitioner would have the burden of alleging and establishing his timely withdrawal therefrom to the satisfaction of a jury. *Hyde* v. *United States,* 225 U. S. 347 (1911); *Sperry Gyroscope* v. *N. L. R. B.,* 129 F. 2d 922, 927, 928 (C.A. 2, 1942). That Costello might thus plead and refute any inference of guilt arising from his answers does not as in the *Emspak* case deprive him of the privilege's protection.

3. The issue of self-incrimination will be one of continuing importance in denaturalization cases especially in view of the present practice of the Government of interrogating citizens before instituting revocation proceedings, then calling them for examinations before trial and finally producing them as the first witness at the denaturalization trial. The validity of the subpoena power in advance of the denaturalization action is before this Court in two cases in which certiorari has been granted. *United States* v. *Minker* (No. 625, Oct. Term, 1954) and *Falcone* v. *Barnes* (No. 716, Oct. Term, 1954). In *Lansky* v. *Savoretti,* 220 F. 2d 906, 910 (C. A. 5, 1955) and *Carroll* v. *Savoretti,* 220 F. 2d 910 (C. A. 5, 1955) the Fifth Circuit has assured those who are the subjects of the Government's denaturalization program that they will have the full benefit of the Fifth Amendment. The decision below, however, is in complete conflict with *Carroll* v. *Savoretti, supra.* To assure uniformity

of decision in maintaining the protection of the Fifth Amendment in denaturalization cases and in all other proceedings certiorari should be granted.

4. The District Court conducted no hearing to ascertain the "setting of possible incrimination" although requested to do so or to take judicial notice of the background facts. (R. 30). The importance of this setting has been emphasized by recent decisions of this Court. *Hoffman* v. *United States*, 341 U.S. 479 (1951); *Emspak* v. *United States, supra.*

It is undisputed that no hearing was here held to develop the setting. The District Court (R. 31) opinion makes it evident that judicial notice of the background facts were not taken. In the exercise of its supervisory powers this Court should instruct the lower courts relative to the proper procedures to follow in developing the "setting of possible incrimination". We submit that a hearing is required unless the background facts are acknowledged or the hearing waived. Neither situation prevailed in the District Court.

Conclusion

It is respectfully submitted that a writ of certiorari should be granted.

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Conclusion

It is respectfully submitted that a writ of certiorari should be granted.

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

October Term, 1954

No. 235

Argued April 7, 1955 Decided May 10, 1955

Docket No. 23435

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

FRANK COSTELLO, *Defendant-Appellant*

Before: L. HAND, SWAN and HINCKS, Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, John F. X. McGohey, Judge.

The order on appeal denied the plaintiff's motion to strike the defendant's answer and render judgment by default in a suit to cancel his certificate of naturalization, imposed a $500 fine for refusal to obey a court order directing the defendant to answer certain questions propounded in an oral examination before trial, and stayed payment of the fine pending the defendant's appeal therefrom. The defendant has appealed from imposition of the fine, and the plaintiff has cross-appealed from denial of its motion for judgment by default. Affirmed.

Jack Wasserman, of Washington, D. C., and George Wolf, of New York City, N.Y., for defendant-appellant.

J. Edward Lumbard, United States Attorney, for

plaintiff-appellee; Alfred P. O'Hara and Thomas A. Bolan, Assistant U.S. Attorneys, of Counsel.

SWAN, *Circuit Judge:*

The appellant, Frank Costello, was admitted to citizenship by an order of the United States District Court for the Southern District of New York on September 10, 1925. On October 22, 1952, the United States Attorney filed in the District Court a petition to cancel his naturalization on the ground of illegality and fraud in its procurement. In the course of this proceeding the defendant refused to obey an order of the court directing him to answer certain questions propounded at his examination before trial. Thereupon the United States moved, pursuant to Rule 37(b)(2)(iii) of the Federal Rules of Civil Procedure that the defendant's answer be stricken and judgment granted by default. This motion was denied but the defendant was directed to pay to the Clerk of the Court a fine of $500 for his disobedience, payment being stayed on condition that he promptly appeal. He did so, and the plaintiff has cross-appealed from so much of the order as denied its motion for judgment by default.

The appellant contests the legality of the fine on two grounds: (1) That the court never obtained jurisdiction over his person in the suit to cancel his naturalization, and consequently the order directing him to answer questions propounded on his examination before trial and the order imposing a fine for refusal to do so were void; and (2) that his fear of self-incrimination justified his refusal to obey the order to answer the questions propounded.

Since the suit to cancel Costello's naturalization was commenced before the effective date of the Immigration and Nationality Act of 1952,[4a] we may assume, as have the

[4a] The effective date for present purposes was December 24, 1952. 66 Stat. 281.

parties, that the procedure for bringing the defendant into court is governed by §338 of the Nationality Act of 1940, 8 U.S.C.A. §738(b). This provides:

> "(b) The party to whom was granted the naturalization alleged to have been fraudulently or illegally procured shall in any such proceedings, under subsection (a) of this section, have sixty days' personal notice in which to make answer to the petition of the United States; and if such naturalized person be absent from the United States or from the judicial district in which such person last had his residence, such notice shall be given by publication in the manner provided for the service of summons by publication or upon absentees by the laws of the State or the place where such suit is brought."

On October 29, 1952 the defendant was personally served in the penitentiary at Atlanta, Georgia, where he was then imprisoned, with the summons and copy of the verified complaint. Before imprisonment he had resided at 115 Central Park West in New York City, which is within the Southern District of New York. He promptly moved to set aside the service of October 29th on the ground that section 738(b) did not authorize personal service on a defendant absent from the district in which he "last had his residence", but required notice to be given by publication. [5] On February 3, 1953 Judge Sugarman ruled that the

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[5] Had the Immigration and Nationality Act of 1952 been applicable it is clear that personal service outside the district of the defendant's residence would have been sufficient. 8 U.S.C.A. § 1451(b):

> "• • •; and if such naturalized person be absent from the United States or from the judicial district in which such person last had his residence, such notice shall be given either by personal service upon him or by publication in the manner provided for the service of summons by publication or upon absentees by the laws of the State or the place where such suit is brought."

issue presented by the motion had become academic because in the meantime an order for service by publication had been obtained and service made in accordance with such order. A motion to set aside the service by publication was denied without opinion by Judge Edelstein. Thereafter the defendant filed his answer, reserving therein his objection to the court's jurisdiction over his person.[6] And in his examination before trial he continued to assert this objection as well as his Fifth Amendment protection against self-incrimination.

We cannot entertain the slightest doubt that the court obtained jurisdiction over the person of the defendant. Whether the service of October 29th was valid the court below did not determine; nor need we, although the plaintiff's contention that personal service upon a defendant absent from the state requires no order for publication would appear difficult to refute.[7] But however that may be, the service after an order of publication was obtained on November 25, 1953 was in strict conformity with the laws of New York with respect to service upon absentees.[8] He was served personally with the summons and complaint at the Atlanta Penitentiary on December 5, 1952.

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[6] Rule 12(b)(2) Fed. R. Civ. P.

[7] Section 235, N. Y. Civil Practice Act:

"Personal service without the state without order.

* * * a defendant domiciled in the state, may be served with the summons without an order, without the state in the same manner as if such service were made within the state, except that a copy of the verified complaint must be annexed to and served with the summons, * * *"

See, also, *United States* v. *Ellis*, E. D. La., 185 F. 546.

[8] Section 233 N. Y. Civil Practice Act:

"Personal service without the state in lieu of publication. In all cases when publication of the summons is ordered, service of the copy of the summons and complaint and of any accompanying notice required by rules by the delivery thereof to the defendant personally without the state in the same manner as if such service were made within the state is equivalent to notice by publication and deposit in the post-office. * * *"

Rule 52 of the N. Y. Rules of Civil Practice:

The appellant argues that his imprisonment in Atlanta was in violation of 18 U.S.C.A. §4083, because he had not been sentenced on any one count to more than a year,[9] and therefore he could not legally be sent to a penitentiary.[10] It is urged that the situation of a defendant thus illegally detained is analogous to that of a person who has been lured into a jurisdiction by fraud and then served with process. In such circumstances the service is invalid.[11] The contention is so fantastic that it deserves mention only to show that it has not been overlooked.

Equally lacking in merit is the contention that any jurisdiction acquired by publication was in rem—relating to defendant's status as a citizen—not in personam; hence he could not be ordered to answer questions or fined for refusal to obey the order. As stated in *Milliken* v. *Meyer*, 311 U.S. 457, 462:

> "* * * Domicile in the state is alone sufficient to bring an absent defendant within reach of the state's jurisdiction for purposes of a personal judgment by means of appropriate substituted service."

See, also, *United States* v. *Stabler*, 3 Cir., 169 F. 2d 995, 997.

The problem presented when a witness claims the constitutional privilege against self-incrimination has been recently expounded in *Hoffman* v. *United States*, 341 U.S.

"Papers to be filed on service by publication or without the state; notice to defendant. If service be made by publication, or without the state in lieu thereof, the summons, complaint and order and the papers on which the order was made must be filed with the clerk on or before the day of the first publication or the day of such personal service. * * *"

[9] His conviction on counts 5, 6 and 8 was affirmed in *United States* v. *Costello*, 2 Cir., 198 F.2d 200, cert. denied 344 U.S. 874.

[10] See *Copeland* v. *Archer*, 9 Cir., 50 F.2d 836.

[11] *Wyman* v. *Newhouse*, 2 Cir., 93 F.2d 313, cert. denied 303 U.S. 664.

479. The privilege extends not only to answers that would in themselves support a conviction under a federal criminal statute but also embraces answers which furnish a link in the chain of evidence needed to support a prosecution for such crime. But the protection thus afforded must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer—his mere say-so will not suffice. It is for the court to determine whether silence is justified.[12] And in determining whether the answer to a question can possibly have a tendency to incriminate, the court must take into consideration the setting in which it is asked.[13] On the motion to compel Costello to answer the questions propounded at his examination before trial, Judge Clancy was requested to take evidence or to take judicial notice of documents which indicated that the then Attorney General regarded Costello as a notorious racketeer who would be prosecuted and after "he had paid his debt to society" would be deported.[14] Because Judge Clancy's opinion makes no mention of this request, it does not follow, as the appellant contends, that he did not take judicial notice of these "background" facts. It may be assumed that he did do so. In any event we shall take judicial notice of them in determining whether the defendant's refusal to answer the questions propounded was justified.

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[12] A few of the many decisions of this court dealing with the subject are *United States* v. *Doto*, 205 F.2d 416; *United States* v. *Costello*, 198 F.2d 200, cert. denied 344 U.S. 874; *United States* v. *Rosen*, 174 F.2d 187; *United States* v. *Weisman*, 111 F.2d 260; *United States* v. *Zwillman*, 108 F.2d 802.

[13] *Marcello* v. *United States*, 5 Cir., 196 F.2d 437, 445; *United States* v. *Coffey*, 3 Cir., 198 F.2d 438, 440; *Aiuppa* v. *United States*, 6 Cir., 201 F.2d 287, 290; *United States* v. *Doto*, 2 Cir., 205 F.2d 416.

[14] The documents were The Kefauver Report, an Official Release of the Department of Justice of October 2, 1952, and articles appearing on the following day in The Washington Post and The New York Times reporting remarks of the Attorney General.

The complaint in the denaturalization proceeding alleged that during the five year period preceding the date of Costello's application for naturalization, he had violated the National Prohibition Act and other federal and state laws, and that he took his naturalization oath with a mental reservation to continue to violate the 18th Amendment, the National Prohibition Act, federal and state income tax laws and other federal and state laws. At his examination before trial on September 7, 1954 Costello gave his name but refused under claim of the privilege against incrimination to answer all other questions put to him. These questions were the following:

"Q. Mr. Costello, when and where were you born?"

"Q. Have you continuously resided in the United States since the time that you arrived here?

"Q. I show you a document [Petition for Naturalization] and ask you if you can identify your signature thereon?

"Q. I show you another paper [Declaration of Intention] and ask if you recognize that and your signature thereon?

"Q. Mr. Costello, have you ever known a man by the name of Harry C. Sausser?

"Q. Have you ever known a man by the name of Frank Goss?

"Q. Were not these two men your witnesses at the time of your Petition for Naturalization?

"Q. What date were you naturalized, Mr. Costello?" [15]

[15] The defendant's attorney also stated that the defendant would refuse to answer all questions relating to his naturalization, his acquaintance with any person, his occupation, his income, any leased premises he may have occupied and whether he was ever arrested or had used any name other than "Frank Costello," even though those questions pertained only to years before 1925.

The subject-matter of these questions was both so general and so remote that by no stretch of the imagination can we conceive how answers thereto would be either incriminatory or lead to prosecution for any federal crime. In so far as the questions were directed to Costello's Declaration of Intention or to his acquaintance with men who, as may be inferred from the questions in their context, had been witnesses on his Petition for Naturalization, the questions were concerned with matters occurring over twenty-nine years ago. Any substantive crimes of such ancient vintage had long since been barred. True, the statute does not run against a conspiracy until the conspiracy ends. But any criminal conspiracy for fraud in obtaining his naturalization necessarily had terminated on the achievement of that objective and hence had long since been barred. And in the absence of some basis for a contrary inference, the possibility of Costello's participation in any other criminal conspiracy which had continued for such a long span of time that it was not yet barred but was still subject to prosecution, was too remote to support a bona fide need for the assertion of the privilege. It is true that he had recently been prosecuted for income tax violations covering the years 1946 to 1949, [16] and that the Kefauver Report and the Attorney General's announced attitude toward Costello gave him greater latitude in claiming the privilege than would otherwise have existed; but he was still under the necessity of showing some reasonable basis for his fear of self-incrimination by answering the questions propounded. Judge Clancy rightly held there was no such basis.

Turning to the plaintiff's appeal from so much of the order as denied its motion for judgment by default, it would

[16] An appeal was pending in this court at the time of his oral examination on September 7, 1954. See *United States* v. *Costello*, decided April 5, 1955.

seem at first blush that this part of the order was interlocutory and therefore non-appealable. But on the authority of *Union Tool Co.* v. *Wilson,* 259 U.S. 107, we are persuaded that jurisdiction to review it does exist. Whether to impose a fine for the defendant's obduracy or to grant a default judgment against him was a matter within Judge McGohey's discretion. Judge McGohey was of opinion that an order summarily depriving the defendant of citizenship without any opportunity thereafter to open the default would not be a "just" order.[17] We are in entire accord with this view.

The judgment is affirmed.

(2407-5)

[17] Rule 37(b)(2) Federal Rules of Civil Procedure limits the court's discretion to "such orders in regard to refusal [to answer] as are just."

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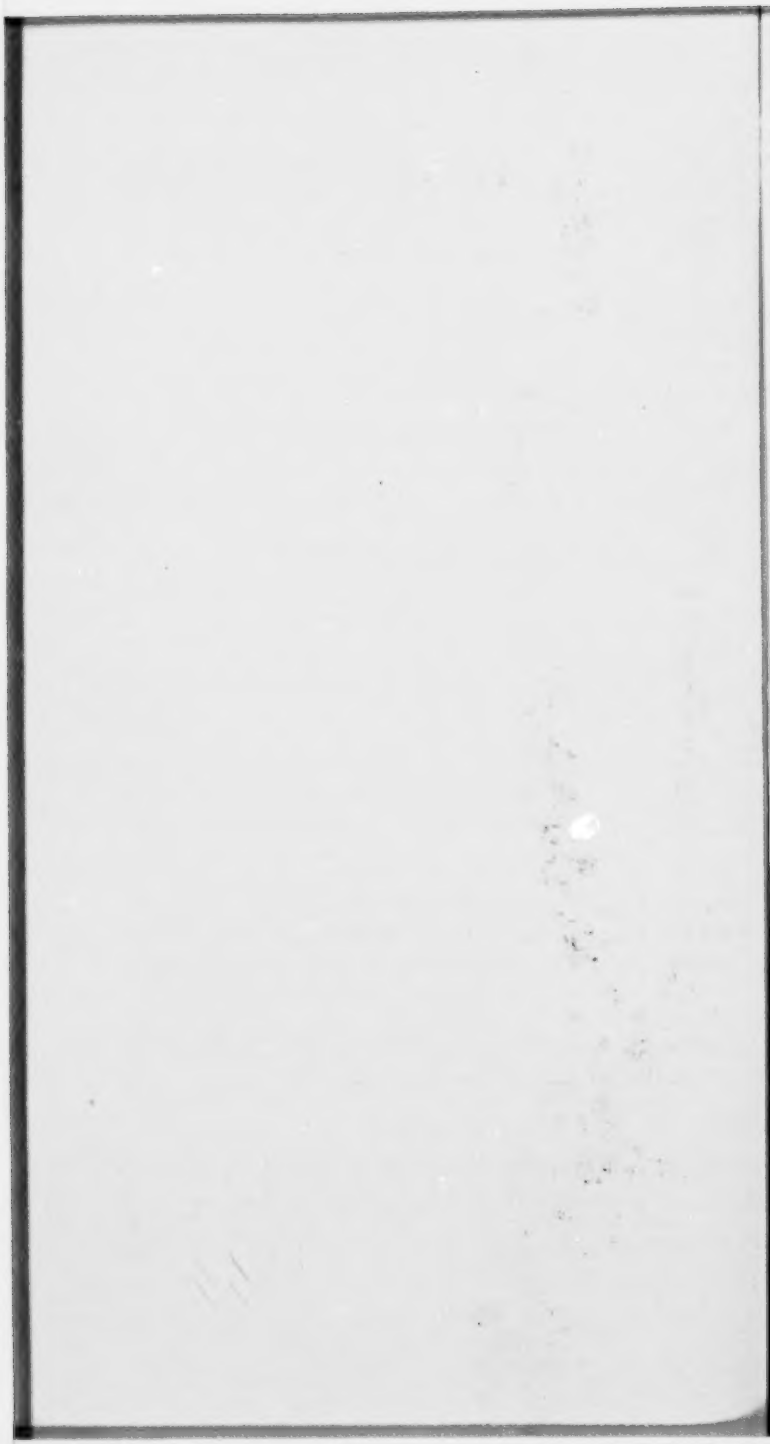
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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 155

FRANK COSTELLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 11-19) is not yet reported. The memorandum opinion of Judge Clancy (App. 31-32) is not reported. The memorandum opinion of Judge McGohey (App. 37-41) is reported at 16 F. R. D. 428.

JURISDICTION

The judgment of the Court of Appeals was entered on May 10, 1955. The petition for a writ of certiorari was filed on June 15, 1955. The juris-

diction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether questions put to petitioner on a deposition in a denaturalization suit, all centering around his petition for naturalization in 1925, were incriminating.

2. Whether petitioner was deprived of a proper opportunity to demonstrate the basis of his claim of privilege.

RULES INVOLVED

The pertinent provisions of the Rules of Civil Procedure are as follows:

Rule 26. * * *

* * * * *

(b) *Scope of Examination.* Unless otherwise ordered by the court as provided by Rule 30(b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts. It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears

reasonably calculated to lead to the discovery of admissible evidence.

* * * * *

Rule 37. * * *

* * * * *

(b) *Failure to Comply With Order.*

(1) *Contempt.* If a party or other witness refuses to be sworn or refuses to answer any question after being directed to do so by the court in the district in which the deposition is being taken, the refusal may be considered a contempt of that court.

STATEMENT

Petitioner was convicted of contempt and fined $500 for refusal to obey a court order directing him to answer certain questions propounded at a pre-trial deposition in the government's suit to cancel his naturalization (R. 42). On appeal, the judgment was unanimously affirmed.[1] The relevant facts may be summarized as follows:

---

[1] The government moved the district court, pursuant to Rule 37(b)(2)(iii) of the Federal Rules of Civil Procedure, to strike petitioner's answer in the denaturalization suit and to grant judgment against him in that proceeding by default because of his failure to comply with the court order (R. 32). On denial of the government's motion by the district court (R. 42, 37-41), a cross-appeal was taken by the government in order to urge that a penalty greater than the $500 fine should have been imposed, *e.g.*, imprisonment or default (R. 43). The district court's order was, however, affirmed by the Court of Appeals (Pet. 19).

On September 10, 1925, petitioner, formerly an Italian national, was admitted to United States citizenship in the United States District Court for the Southern District of New York (R. 2, 17). On October 22, 1952, a complaint was filed in the same court seeking the cancellation of the naturalization decree on the grounds of illegality and fraud. The complaint alleged, *inter alia,* that, whereas petitioner had sworn that for five years preceding naturalization he had behaved as a man of good moral character and well disposed to the good order of the United States, he had in fact been engaged in liquor dealings in violation of the National Prohibition Act and related statutes, and in large scale gambling activities, and had evaded the payment of federal and state taxes during such period. The complaint also alleged that the two witnesses to his naturalization (Frank A. Goss and Harry C. Sausser) were not credible witnesses as required by law, and that they testified falsely in various material matters. It was charged that petitioner misrepresented his occupation to be real estate when in fact it was gambling and illicit traffic in liquor; that he misrepresented the occupation of his witnesses, his alias names, and the fact of prior arrests; and that he had fraudulently concealed prior arrests and convictions (R. 2-5). In his answer, petitioner admitted prior Italian nationality and admission to United States citizenship, but denied the other material allegations of the complaint (R. 17-19).

The United States moved to take petitioner's deposition pursuant to Rule 26, F. R. Civ. P. (R. 19). On September 7, 1954, the date to which the hearing was adjourned (R. 29), petitioner appeared with counsel and was sworn. After giving his name, he was asked when and where he was born. He stated (R. 21):

> I refuse to answer any questions. I stand on my constitutional rights by advice of counsel.

Petitioner then refused to answer all other questions put to him (R. 21-22). His counsel stated for the record that petitioner would refuse to answer all questions except his name, including questions concerning his naturalization, his acquaintances, prior arrests, aliases, his occupation at any period of his adult life, and property held prior to naturalization (R. 22).

On October 13, 1954, the government moved the court for an order (R. 28-30) requiring petitioner to answer the questions previously put to him. Petitioner made no written response to the government's motion beyond a request that the court either take judicial notice of certain documents,[2]

---

[2] *Viz:* "1. Senate Report 307, 82nd Congress, 1st Session. "(The Kefauver Report).

"2. Official Press Release of Department of Justice, October 2, 1952, relating to denaturalization of racketeers.

"3. Statement of Attorney General McGranery as reflected in Washington Post and the New York Times, October 3, 1952."

or take evidence as to their contents (R. 30-31). Petitioner's counsel argued that such answers as were sought to be compelled would "furnish a link in a chain of evidence that may lead to federal prosecution for perjury, conspiracy, income tax evasion and other crimes" (R. 31). In an opinion dated October 28, 1954, Judge Clancy granted the government's motion, holding that "it is defendant's task to justify his refusal to answer and asserting this litany of crimes is not enough." The court observed that any crimes, including conspiracy arising out of his naturalization in 1925, would have been long barred by the statute of limitations, as would the crimes of perjury, income tax evasion, or any other crime committed in 1925 or earlier (R. 31-32).

On November 5, 1954, the taking of the deposition was resumed. At the outset, petitioner's counsel explained (R. 25) that his client "intends to persist in his claim of privilege under the Fifth Amendment as to all those questions." Nevertheless, the government attorney posed the following questions, and petitioner gave the following answers (R. 25-27):

> Q. Now, Mr. Costello have you continuously resided in the United States since you first arrived here?
>
> A. On the theory of Mr. Wolfe's statement I refuse to answer the question.

* * * * *

Q. I show you a document [petition for naturalization] which has been marked Gov. Ex. 1 for identification on September 7 and ask you if this——

A. Excuse me. (Witness got glasses from his coat.)

Q. And ask you if your signature appears thereon in two places?

A. I refuse to answer.

Q. I show you a document which was marked Gov. Ex. 2 for identification [Declaration of Intention] and ask you if your signature appears thereon?

A. I refuse to answer.

Q. Mr. Costello, have you ever been arrested?

A. I refuse to answer.

Q. Were you ever arrested prior to 1925?

A. I refuse to answer that.

Q. Have you ever been known by any other name?

A. I refuse to answer.

Q. Have you ever known a man by the name of Harry C. Sausser?

A. I refuse to answer that.

Q. Have you ever known a man by the name of Frank H. Goss, G-o-s-s?

A. I refuse to answer.

Q. Where did you live during the three-year period immediately prior to 1925?

A. I refuse to answer.

Q. Do you recall who were the witnesses on your naturalization petition?

A. I refuse to answer that.

Q. Did you know the witnesses who were on your naturalization petition?

A. I refuse to answer that.

Q. Am I correct in understanding that you will refuse to answer any question which relates to your naturalization?

A. Yes.

Q. And that you will refuse to answer any question as to any individual whom you have known, is that right?

A. Right.

Q. And even though those questions may pertain only to the period of time prior to 1925?

A. Right.

Q. Your position will be the same?

A. Same.[3]

Following the second refusal of petitioner to answer, the government on November 9, 1954, moved to strike petitioner's answer and for default judgment pursuant to Rule 37(b)(2)(iii) of the Federal Rules of Civil Procedure (R. 32-35). Peti-

[3] Petitioner erroneously characterizes (Pet. 2) these questions as pertaining "to his acquaintances, occupation, income, premises leased by him, aliases and arrests in 1925 and prior thereto." None of the questions *for which he was cited in contempt* related to his acquaintances other than the identity of his two naturalization witnesses, Sausser and Goss. Neither did any question relate to his occupation, his income, or premises leased by him.

tioner filed an opposing affidavit (R. 35-37) citing in justification of his refusal the fact that in a Senate Committee investigation he had been identified with bootlegging and gambling, and that a former Attorney General had announced that he would be denaturalized and deported but not until he had repaid his "debt to society."

On December 10, 1954, the district court (McGohey, J.) entered an order denying the government's motion to strike petitioner's answer and enter a default judgment, but levying a $500 fine against petitioner for his contempt of the court's order (R. 37-42).

In affirming the lower court judgment, the Court of Appeals (Swan, L. Hand, and Hincks J.J.) observed (Pet. 18):

> The subject-matter of these questions was both so general and so remote that by no stretch of the imagination can we conceive how answers thereto would be either incriminatory or lead to prosecution for any federal crime. In so far as the questions were directed to Costello's Declaration of Intention or to his acquaintance with men who, as may be inferred from the questions in their context, had been witnesses on his Petition for Naturalization, the questions were concerned with matters occurring over twenty-nine years ago. Any substantive crimes of such ancient vintage had long since been barred. True, the statute does not run against a conspiracy until the con-

spiracy ends. But any criminal conspiracy for fraud in obtaining his naturalization necessarily had terminated on the achievement of that objective and hence had long since been barred. And in the absence of some basis for a contrary inference, the possibility of Costello's participation in any other criminal conspiracy which had continued for such a long span of time that it was not yet barred but was still subject to prosecution, was too remote to support a bona fide need for the assertion of the privilege. * * *

ARGUMENT

1. It is evident that petitioner is in effect asserting that his present difficulties with law-making authorities with respect to his recent activities[4] give him a blanket immunity from testifying to anything in his past, without regard to the nature or type or period of the questions asked. The general arguments advanced in the petition for certiorari have very little relationship to the actual questions put to petitioner, which are set forth above at pp. 6-8 of the Statement. Petitioner's answer to the government's complaint admitted

[4] Concededly, in recent years he has been in trouble with the law in various ways. *E.g.*, *United States* v. *Costello*, 198 F. 2d 200 (C.A. 2) (contempt of the Senate); *United States* v. *Costello*, 221 F. 2d 668 (C.A. 2), pending on petition for certiorari, No. 72, this Term (prosecution for income tax evasion for years 1946-1949). And, admittedly, official attention has focused attentively on his current reputation for alleged illegal activity, as he demonstrated to the court (R. 30-31, 35-36), and now reiterates in his petition (Pet. 5, fn. 1).

paragraph 2 (R. 17) which alleged that on May 1, 1925, he had filed a petition for naturalization (R. 2). Under these circumstances, it is inconceivable that petitioner thought, or could properly have thought, that he would be incriminated by answers to questions relating to the identification of his petition or of his declaration of intention or the names of his witnesses. Cf. *Rogers* v. *United States,* 340 U.S. 367, 374-375. On the basis of the refusal to answer these three questions alone, the judgment of the district court that there was a contumacious refusal to answer can be upheld. Broad as has been the interpretation which this Court has given the privilege against self-incrimination, it has never held that mere assertion of the privilege, in and of itself, justifies a refusal to answer, where the answers could not under any reasonable construction be deemed incriminating. *Hoffman* v. *United States,* 341 U.S. 479, 486; *Mason* v. *United States,* 244 U.S. 362, 365. Cf. *Ex Parte Irvine,* 74 Fed. 954, 961-962 (S.D. Ohio).

The other questions on which the judgment below rests are all limited to the circumstances surrounding the naturalization petition in 1925. They include questions as to whether petitioner actually knew his witnesses, where he lived prior to his naturalization, and whether he had ever been known by any other name. Answers to those questions might afford evidence for denaturalization in a way which the questions discussed above would not, but, as the courts below held, petitioner has made no showing that such answers can

on any reasonable theory be deemed incriminatory in 1954. Obviously, the "prohibition era" crimes (including tax evasion), prosecution for which petitioner now claims to fear (Pet. 8), have long been barred by applicable statutes of limitations and are no longer a source of present incrimination. *Brown* v. *Walker*, 161 U.S. 591, 598; *Robertson* v. *Baldwin*, 165 U.S. 275, 282; *Moore* v. *Backus*, 78 F. 2d 571, 577 (C.A. 7), certiorari denied, 296 U.S. 640. And it verges on the fantastic to contend that the answers called for might turn up an unbroken 29-year conspiracy to violate the prohibition or other federal laws.[5] In contrast to the cases involving past membership in the Communist Party,[6] the questions asked here, which were limited to the circumstances of naturalization, cannot be interpreted as an attempt to trace the genesis

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[5] Petitioner cites the case of *United States* v. *Zwillman*, 108 F. 2d 802 (C.A. 2, 1940), for the proposition that questions as to past facts might tend to establish the fact of continuing conspiracy so as to justify assertion of the privilege. But the factual "setting" of that case was quite different. The defendant, in response to a "John Doe" warrant, appeared before a grand jury in 1939 which was then investigating an alleged conspiracy to commit "any offense against the United States, or to defraud the United States." He refused to answer questions as to the identity of his business associates in the years 1929 to 1932, some ten to seven years before the inquiry. There, unlike the present case, there was a reasonable and highly likely basis for the conclusion that the answers might establish a connection between the defendant's business at the earlier period (nowhere near as remote as in the present case), and the continuing crime which the grand jury was then investigating.

[6] *Blau* v. *United States*, 340 U.S. 159; *Brunner* v. *United States*, 343 U.S. 918.

of a continuing conspiracy for the purpose of identifying its present character, leaders, and membership. The most that the answers might develop would be a conspiracy, in 1925 or before, to procure naturalization illegally or through fraud, and plainly such a conspiracy would have terminated on the consummation of its objective in 1925. Cf. *Bridges* v. *United States,* 346 U.S. 209; *Lutwak* v. *United States,* 344 U.S. 604, 615-617; *Hyde* v. *United States,* 225 U.S. 347, 368-369; *United States* v. *Rubenstein,* 151 F. 2d 915, 917 (C.A. 2). Petitioner's theory of continuing conspiracy by concealment (Pet. 7) was rejected by this Court in the *Lutwak* case. Moreover, there is no available fact in this case which even remotely suggests that petitioner could have apprehended such a prosecution at the time he was called upon to testify.

Petitioner's claim that his answers might possibly be used as evidence in the prosecution of crimes of recent vintage is equally unsubstantial. The identification of his naturalization papers, his witnesses, his pre-1925 arrests, and his date of birth could not have any tendency to establish a connecting evidentiary link in, for instance, his 1954 tax evasion case (*United States* v. *Costello, supra,* 221 F. 2d 668), or any possible federal prosecution because he has been recently engaged in gambling operations (petitioner admitted that he was a gambler in his tax evasion case, 221 F. 2d at 671). Similarly, it is difficult to perceive any connection between the 1925 evidence called for, and a future perjury prosecution. While peti-

tioner testified before a committee of the Senate in March 1951 (*United States* v. *Costello, supra,* 198 F. 2d 200) and its report contains a recommendation to the United States Attorney to determine whether perjury had been committed by petitioner (S. Rep. 307, 82d Cong., 1st sess., p. 117), any possible prosecution for perjury at the Senate hearing which would be revealed by the November 5, 1954, examination of petitioner (*supra,* pp. 6-8) would have been barred by the statute of limitations, even if the answers tended to be incriminating.

In short, petitioner's assertion of the privilege fails to meet the test cited by this Court in *Mason* v. *United States,* 244 U.S. 362, 365-366:

> * * * the danger to be apprehended must be real and appreciable, with reference to the ordinary operation of law in the ordinary course of things—not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct.

And see: *Rogers* v. *United States,* 340 U.S. 367, 374-375; *Brown* v. *Walker,* 161 U.S. 591; *Heike* v. *United States,* 227 U.S. 131, 144; *Ex Parte Irvine,* 74 Fed. 954, 960 (S.D. Ohio).

2. In opposition to the government's motion for an order directing him to answer questions after his first refusal to do so (R. 28-30), petitioner asked the court to take judicial notice or to take

evidence respecting documents he offered, *viz.* a Senate committee report and two press releases (R. 30). He set forth the gist of the documents in opposition to the government's motion for default judgment and other relief which culminated in the fine for contempt (R. 35-37).

Judge Clancy, in his opinion directing petitioner to answer, noted that petitioner's asserting of a "litany of crimes" was not enough to justify the refusal to answer (R. 31), thus indicating that he was aware of petitioner's present difficulties. Judge McGohey's familiarity with the background of the Senate Committee Report on which petitioner places his principal reliance to develop the setting of incrimination, is reflected in his memorandum opinion in *United States* v. *Doto,* 110 F. Supp. 518 (S.D. N.Y.). The Court of Appeals took judicial notice of the documents (Pet. 16). Thus, there is no merit in petitioner's contention (Pet. 10) that he was deprived of an opportunity to develop the background facts. The procedure by which a court informs itself as to the *bona fides* of a claim of privilege is not governed by the rigid rules of admissibility and pertinency which control the reception of evidence during a trial. The court may take notice of pertinent facts in an informal way. Cf. *Hoffman* v. *United States,* 341 U.S. 479, 487-489; *United States* v. *Coffey,* 198 F. 2d 438, 440 (C.A. 3); *Alexander* v. *United States,* 181 F. 2d 480, 484 (C.A. 9). The courts below did consider the background in this case, but they reached the conclusion that the background did not show that

the questions concerning the 1925 naturalization might tend to incriminate in 1954.

CONCLUSION

The questions presented, which relate to the special facts of this case, were correctly answered by the court below. There is no conflict of decisions which should be resolved by this Court. Accordingly, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1955.

Eccl.

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